No. 88-674

(2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JACK ABADJIAN, MARK BALL,
JOSEPH BROWN, JOHN EGHENIAN,
BRAD MAY, NASSIR MAZAREI,
DONALD PROUSE, AL ROSENSTEIN,
ARAM SHISHMANIAN, JOE SMIDERLE
and STEPHEN WEBBER,
Petitioners,

v.

GULF OIL CORPORATION, a
Pennsylvania corporation,
THRIFTY OIL CORPORATION, a
California corporation,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two

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BRIEF IN OPPOSITION OF RESPONDENT THRIFTY OIL CO.

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34 pp

COUNTER-STATEMENT REGARDING PARTIES TO THE PROCEEDING BELOW, INCLUDING LIST OF AFFILIATED CORPORATIONS

A. Pursuant to Rule 28.1, respondent Thrifty Oil Co. certifies that it does not have any parent companies, affiliates or subsidiaries except wholly owned subsidiaries.

B. Under the heading "Parties to the Proceeding Below," the petition for a writ of certiorari contains the material misstatements and omissions noted below:

1. The parties to the proceeding below also included plaintiff Ben Ceson ("Ceson"). However, Ceson is not a petitioner and may no longer have an interest in the case.

2. The petition includes the gratuitous assertion that "all Petitioners met the definition of 'franchisee' [as defined in the PMPA]." (Pet. at ii.) Although the state trial court made a finding to this effect, respondent Thrifty Oil Co. appealed that determination.* The court below did not reach the issue, in light of its ruling that it did not have subject matter jurisdiction.

3. The petition erroneously refers to "Respondent Mobil Oil Corporation." *Id.* Mobil Oil Corporation has never been a party to this case.

4. The petition erroneously contends that Thrifty is *not* a party "to the issues presented to this Court." *Id.* That contention is impossible to sustain in light of the fact that Thrifty was the appellant in the court below, which reversed an adverse judgment of the trial court. (Pet. App. 1.)

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* Thrifty's appeal was raised on the grounds, *inter alia*, that all but three of the petitioners had *terminated* their prior "franchise" relationship with respondent Gulf Oil Corporation, and had entered into new agreements on a non-franchised basis.

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BRIEF IN OPPOSITION OF RESPONDENT THRIFTY OIL CO.

INTRODUCTION

After seven years of litigation, the California courts have finally reached the correct result and have rejected petitioners' unfounded claims under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801 *et seq.* Applying directly applicable case authority, the

court below held that PMPA actions are within the exclusive jurisdiction of the federal courts. On two previous occasions, petitioners had defeated defendants' right to a federal forum by expressly disclaiming their reliance on the PMPA and obtaining remand orders. As a direct result of petitioners' tactical maneuvering, the case was finally submitted to a state court judge who characterized the PMPA as "lousy legislation" and "a poorly drafted federal statute that is very hard to understand. . . ." The state trial court entered judgment requiring respondent Gulf Oil Corp. ("Gulf") to sell petitioners' leased service station premises to them, rather than to respondent Thrifty Oil Co. ("Thrifty").

This action was filed in 1981, after Thrifty entered into its contract with Gulf to purchase more than 300 of Gulf's service station properties in the Southwest. A group of dealers, now petitioners before this Court, sued in state court to block the sale and force a sale to themselves on the same terms. However, petitioners cannot demonstrate the existence of that alleged right in the letter or the spirit of the PMPA. While the PMPA was enacted only to protect service station "franchisees" from arbitrary or discriminatory terminations or nonrenewals, petitioners were never terminated or nonrenewed in any alleged "franchise" until they each rejected Gulf's offers in 1981-82 to extend the dealership contracts for a new term after their expiration date. Even though petitioners rejected Gulf's renewal offers, they have retained actual possession of the station properties for the last seven years, while using their unfounded federal-law claims as an impediment to any eviction proceedings. Petitioners have also stopped paying rent, so that their continued occupation has been on a rent-free basis.

In ruling that the PMPA claims could not be adjudicated in state court, the court below did not reach the merits of petitioners' claims. However, out of the hun-

dreds of cases decided under the PMPA since its enactment in June 1981, no court other than the trial court in this case has ever accepted the "first refusal" right which petitioners assert they had. Moreover, no court has ever accepted the procedural argument which petitioners now assert, namely, that the state courts allegedly do not have jurisdiction to consider their own jurisdiction in a case which has been removed to federal court and thereafter remanded. The rule against appellate review of remand orders does not divest the state courts of any jurisdiction that existed prior to removal, nor does it confer jurisdiction on the state courts that they would not otherwise have had.

The questions purportedly presented by the petition are far from "certworthy," because they are each intertwined with the unique procedural circumstances of this case. Those circumstances include petitioners' disclaimers in federal court that, "We have not purported to allege a cause of action under the Petroleum Marketing Practices Act . . . ." The circumstances also include a rare form of error by the federal district court, which remanded the removed action to state court despite the acknowledged existence of a federal claim. Even if this error cannot be reviewed, it need not—and should not—be compounded.

Thus, there is no issue of general importance to warrant Supreme Court review. After seven years of litigation, the court below penetrated petitioners' unmeritorious contentions and concluded that petitioners' exclusive remedy was to have their claims adjudicated in an action filed in federal court. The fact that petitioners made a conscious decision not to pursue a federal court remedy does not change the correctness of this ruling, which should be allowed to stand and to bring this protracted litigation to an end.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

In July 1978, Gulf decided to withdraw from gasoline marketing in the Southwest. Even prior to that decision, Gulf had been offering inducements to its retail service station dealers if they would terminate their "Gulf" branded franchise agreements, and enter into new agreements on an "unbranded" basis.[1] As a result of the planned withdrawal, Gulf needed to dispose of more than 300 service station properties in California, Arizona and Nevada.

In July 1980, Thrifty offered to purchase those stations for cash, and a written contract was executed by Gulf and Thrifty on September 30, 1980. That contract expressly provided that "Gulf will continue to supply gasoline directly to existing dealers who [will] continue to operate stations purchased by [Thrifty]." Gulf and Thrifty also agreed to comply with the provisions of the PMPA to the extent it applied to any affected dealer.[2]

After the contract was signed, Gulf informed its dealers that "you will be given notification and the offer required by the [PMPA] to acquire the station [you occupy] yourself." Gulf's Vice President, Mr. Kemple, testified that the intent of the letter was only to assure

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[1] Seven of the petitioners accepted Gulf's offer of "unbranded" gasoline supply agreements. Three of the dealers declined the offer, and their contracts were then renewed on a "Gulf" branded basis. The eleventh petitioner, Stephen Webber, did not become a party to a motor fuel supply relationship with Gulf until April 7, 1979, and Gulf did not offer a branded relationship to him.

[2] During the negotiations, Gulf's representatives suggested that some of its retail service station dealers might have the right under the PMPA to purchase the service stations they were currently occupying under lease agreements. However, Gulf's representatives appeared confused concerning the effect of the PMPA, and no resolution was reached except to provide that the parties would honor whatever rights actually existed under the statute.

the dealers that their rights, *if any*, would be accommodated. Despite that intention, Gulf began to issue "Notices of Nonrenewal" to some of its dealers, which cited Gulf's decision to sell the stations as the basis for the nonrenewal and which contained an offer to sell the leased station to the affected dealer. During December 1980 and January 1981, Gulf cancelled its contracts with five of its dealers (none of whom became plaintiffs in this case) by allowing those dealers to purchase their stations.

When Thrifty learned that stations included in its purchase contract were being sold to third parties, Thrifty notified Gulf that its conduct constituted a material breach of the agreement. After review, Gulf's attorneys agreed with Thrifty that the dealers did *not* have a right of first refusal. As long as the dealers' leases and supply agreements were not being disturbed, Gulf acknowledged that the PMPA was not implicated and that Gulf could not obtain a unilateral benefit (cancellation of its gasoline supply obligation) by depriving Thrifty of stations conveyed under the contract.

After reaching this conclusion, Gulf requested an extension of the escrow period so that it could either renew its agreements with the dealers or persuade them to terminate their relationship with Gulf by mutual consent. Commencing in July 1981, Gulf offered three-year renewal agreements to each of its dealers, including petitioners, which were on the same terms as the existing lease and supply agreements, except for an increase in the amount of rent.[3] However, each of the petitioners refused these offers for a continued relationship.[4]

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[3] The rent was proposed in accordance with Gulf's national rent policy. The dealers disputed Gulf's evidence on this issue, but the issue was never tried.

[4] Commencing on September 10, 1981, Gulf issued Notices of Nonrenewal to petitioners, based on their refusal to agree to the renewal offers. When petitioners refused to vacate the leased

II. PROCEDURAL HISTORY.

Petitioners filed the Complaint against Gulf and Thrifty in Los Angeles County Superior Court on August 3, 1981. The Complaint and the Amended Complaint, which was filed shortly thereafter, alleged that Gulf's dealers had the right to purchase their leased service stations on a first refusal basis. The Amended Complaint expressly cited the PMPA in support of that claim.

On September 14, 1981, Gulf and Thrifty removed the Amended Complaint to the United States District Court for the Central District of California. However, petitioners argued that the action only sought *state law* remedies based on *state law* theories, asserting that "[W]e have not purported to allege a cause of action under the Petroleum Marketing Practices Act . . . ." Petitioners also argued that since Thrifty was not a "franchisor" for purposes of the PMPA's enforcement provisions, 15 U.S.C. § 2805(a), Thrifty must be a party only to pendent state law claim (i.e., a "pendent party") over whom the federal court could not acquire jurisdiction. The district court adopted petitioners' arguments and remanded the entire action to state court on January 4, 1982.

Without ever filing any further amendment to their complaint, petitioners then proceeded in state court to file a motion "under PMPA" for partial summary judgment.[5]

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premises, Gulf filed unlawful detainer actions against them. However, Gulf has never conveyed the properties to Thrifty as required under the contract, and the litigation at bench includes Thrifty's cross-complaint against Gulf for breach of its contract to convey those station properties.

[5] Earlier, the state court judge then assigned to the case, Judge Schauer, had questioned petitioners' contention that their claims could be asserted as a matter of *state* law. The court asked, "Why do you eschew this idea of bringing an action under the [Petroleum Marketing Practices] Act? . . . Why have you avoided at least theoretically bringing an action under the Act?" The attorney who

Based on this explicit reliance on federal law, defendants again removed the action to the district court on October 17, 1983. However, the same district court judge concluded that "the claims against Thrifty do not arise under PMPA," and that the district court could not entertain these claims. (Pet App. 8, 22.) Even though acknowledging that the claims against Gulf, at least, were within its original jurisdiction, the district court further concluded that it was "require[d] . . . to remand the entire case." (Id.) At no time did the district court raise, address or consider any issue as to whether the state courts had jurisdiction over PMPA claims.

When the action was returned to state court, the parties filed various motions for partial summary judgment. After a hearing, a newly assigned judge ruled that the contract between Gulf and Thrifty was "an event and an action that gave to each moving Plaintiff a right of first refusal." (Pet. App. 26.) The trial judge also held that "PMPA jurisdiction is not exclusively in the Federal Courts . . . ." (Pet. App. 27.) On a subsequent occasion, the judge explained his negative views concerning the PMPA and the federal legislative process, as follows:

> [T]his is an unusually complex problem involving a *poorly drafted federal statute* that is very hard to understand.
>
> You have to get a good grip on your tail before you start reading that PMPA. It is a very complex and complicated and poorly constructed statute.
>
> *It is a classic example of the kind of legislation we get out of the Congress* when the interest of the Congressmen is a self-perpetuation and tending to the interests of all of the lobbyists that perpetuate it.

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was present at the hearing responded that he had not been privy to that decision. Judge Schauer responded, "Its a tortured course—a tortuous course."

> It is lousy legislation. *Its intention is probably very good, but it is expressed very awkward.* It is a terrible job . . . . We don't know what the appellate court is going to do.

After the trial judge had purported to decide the PMPA issue, the remainder of the case was decided on stipulated facts, and a judgment was entered on January 16, 1986. (App. 1a.) The Judgment orders the stations to be sold to the dealers at a price which is only 20% higher than the net book value of the properties on Gulf's records, without any compensation to Thrifty.

Thrifty and Gulf appealed the judgment. On May 8, 1988, the court below reversed the trial court's judgment, holding that petitioners' PMPA claims are subject to exclusive federal jurisdiction. (Pet. App. 1.) Petitioners filed a Petition for Review in the California Supreme Court, which that court denied on July 20, 1988. (Pet. App. 7.)

REASONS FOR DENYING THE PETITION

I. THE QUESTIONS PRESENTED BY THE PETITION DO NOT WARRANT REVIEW BY THIS COURT.

The petition for a writ of certiorari should be denied because neither of the questions presented relate to an issue on which there is any substantial difference of opinion or need for Supreme Court intervention. Moreover, in deciding that it lacked subject matter jurisdiction over the PMPA, the court below correctly applied prior holdings by both federal and state courts, including this Court's opinion in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981).

In overview, this case concerns petitioners' attempt to obtain an unearned windfall profit on the basis of an unmeritorious allegation that when Gulf sold the approximately 300 service station properties in the Southwest to Thrifty, the PMPA required that the stations occupied

by petitioners to be sold to petitioners at Thrifty's price.[6] Despite petitioners' reliance on a distorted interpretation of the PMPA as their only alleged basis for the purported purchase option, petitioners have sought strenuously at every turn to *avoid* federal court as the forum in which to litigate their claims.

Petitioners' reasons for avoiding the federal courts have nothing to do with the hardships allegedly suffered by "rural" service station dealers in retaining "expensive big city attorneys." (Pet. at 16.) Actually, petitioners all reside and have their businesses in metropolitan Los Angeles, and have employed the same counsel in both the state and the federal court proceedings. However, petitioners were aware that even though the state courts may be less familiar with the PMPA, the state courts in California are more hospitable to claims by service station dealers in actions against "big oil companies," even if those claims are fundamentally lacking in legal or factual merit.

Petitioners' tactical preference for state court proved to be correct in this case, at least initially. In granting each petitioner an option to purchase his leased service station property,[7] the California trial court judge ex-

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[6] The "package" price offered by Thrifty for the more than 300 stations was computed by multiplying Gulf's net book value for the properties by a factor of 1.2 (120%). Although equitable as applied to the transaction as a whole, when a book value appraisal method is applied to the specific locations involved in this case, for purposes of attempting to give petitioners the benefit of Thrifty's price, the result is significant undervaluations in comparison to fair market value.

[7] By contrast, none of the many federal district or circuit courts that have been presented with similar claims under the PMPA have ever awarded "relief" in the form of a forced sale of service station property. *See, e.g., Avramidis v. Atlantic Richfield Co.*, 623 F. Supp. 64, 68 (D. Mass. 1985), *aff'd sub nom. Avramidis v. ARCO Petroleum Products Co.*, 798 F.2d 12 (1st Cir. 1986); *see also Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1390 (9th Cir.

pressed his intention to apply what he believed to be the "good intentions" of the PMPA, even though he found the statute to be "poorly constructed" and "very hard to understand." (*Supra* at 7-8.) While many state court judges do not share that apparent antipathy to federal legislation, the judge's comments illustrate that the principal factors supporting exclusive federal jurisdiction—which are (1) the desirability of uniform interpretation, (2) the expertise of federal judges in federal law, and (3) the greater hospitality of federal courts to federal claims—are all strongly present with respect to PMPA.

Moreover, there is no conflict among the circuits regarding exclusive jurisdiction under the PMPA, because the circuit courts have not had any occasion to address the issue.[8] As far as Thrifty's research has disclosed, *Rustom v. Atlantic Richfield Co.*, 618 F. Supp. 210 (C.D. Cal. 1985), was the first case in which the issue of exclusive jurisdiction under the PMPA was squarely decided.[9] Apparently, the issue did not arise prior to

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1986) ("first refusal" claim advanced under parallel provision of the PMPA; *held*: "[o]ur review of the PMPA discloses no provision giving [the dealer] the right he asserts"); *Fresher v. Shell Oil Co.*, 846 F.2d 45 (9th Cir. 1988) (no violation of PMPA in the sale of service stations to a third party).

[8] The only possible reference to the issue by a circuit-level federal court was in *Shell Oil Co. v. Nelson Oil Co.*, 627 F.2d 228, 231 n.1 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 1022 (1980), in which the court's statement that "federal courts have exclusive jurisdiction over the claims raised by Shell" may have included Shell's claims under the PMPA, as well as Shell's claims under the Economic Stabilization Act of 1970.

[9] Previously, in *Ted's Tire Service, Inc. v. Chevron U.S.A., Inc.*, 470 F. Supp. 163, 165-66 (D. Conn. 1979), the court suggested in dictum that PMPA jurisdiction would be concurrent; the court stated that, if the complaint were amended to allege a PMPA claim, the action "would be within the removal jurisdiction of this Court." *Id.* A few courts subsequently cited *Ted's Tire* on this point, also in dictum, without examining the issue. *See, e.g., California Arco Distributors, Inc. v. Atlantic Richfield Co.*, 158 Cal. App. 3d 349, 364, 204 Cal. Rptr. 743 (1984).

Rustom because PMPA cases were being litigated exclusively in the federal courts.[10] After *Rustom*, the doctrine of exclusive jurisdiction over PMPA has been adopted *without exception* by state and federal courts in California.[11] Indeed, only an intermediate-level appellate court in Pennsylvania has subsequently expressed any dissenting view.[12] However, this Court should be aware that the Supreme Court of Pennsylvania has granted

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[10] The only exceptions appear to be *Ricco v. Shell Oil Co.*, 180 N.J. Super. 399, 434 A.2d 1151 (1981), and *Frankard v. Amoco Oil Co.*, 116 Wis. 2d 254, 342 N.W.2d 247 (1983). However, neither court addressed the jurisdictional issue. Indeed, in *Ricco*, the plaintiff took the position that the New Jersey Franchise Practices Act was the controlling law, and asserted contentions under the PMPA only "in the alternative." In *Frankard*, the Wisconsin appellate court stated that any question of whether the PMPA was properly before the trial had been waived, even though plaintiffs did not raise their PMPA claim until five days prior to trial.

In other state court cases cited by petitioners (Pet. at 12), the PMPA was considered only as a collateral issue, *and the courts expressly commented that the franchisee would be compelled to litigate his PMPA claims in federal court. Walters v. Chevron U.S.A., Inc.*, 154 Ga. App. 636, 269 S.E.2d 495 (1980); *Bates v. Chevron U.S.A., Inc.*, 151 Ga. App. 544, 260 S.E.2d 367 (1979); *see also Da Costa's Automotive, Inc. v. Birchwood Plaza Shell, Inc.*, 482 N.Y.S.2d 832, 106 A.D.2d 484 (N.Y.A.D. 1984) (plaintiff did not have standing to assert PMPA). Also, petitioners erroneously state that *Lanham v. Amoco Oil Co.*, 481 F. Supp. 405 (D. Md. 1979), "remand[ed] litigation to the State Court forum for trial on the merits." There is nothing in *Lanham* to support that assertion.

[11] *Elimelekh v. Texaco Refining & Marketing, Inc.*, Bus. Fran. Guide (CCH) ¶ 8663 at 16,751, 16,752 (C.D. Cal. 1986); *Eckel v. Atlantic Richfield Co.*, No. CV 85-8451 (AHS) slip op. (C.D. Cal., January 30, 1986); *Niakan v. Samaan*, 199 Cal. App. 3d 716, 245 Cal. Rptr. 24 (1988), *petition for cert. filed*, September 30, 1988; *Kreisher v. Mobil Oil Corp.*, No. A036017, unpublished portion of opinion (Cal. App., February 5, 1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 244 (1988). The opinion of the court below (Pet. App. 1) cited *Niakan* in support of its holding that PMPA is subject to exclusive federal jurisdiction.

[12] *Johnson v. Mobil Oil Corp.*, 364 Pa. Super. Ct. 275, 528 A.2d 155 (1987), *appeal granted*, —— Pa. ——, 544 A.2d 445 (1988).

an appeal on that very issue. *Johnson v. Mobil Oil Corp.*, —— Pa. ——, 544 A.2d 445 (1988).

Moreover, the distinction between exclusive and concurrent jurisdiction in PMPA cases ordinarily has little significance, since PMPA actions may be *removed* to federal court in the rare instances in which they are filed in state court. *See, e.g., Lanham v. Amoco Oil Co.*, 481 F. Supp. at 405. The only reason the issue became important in the case at bench is that the federal court erroneously decided not to accept removal jurisdiction. (Pet. App. 8.) While the problems created by that error were important to the litigants in this case, there is no plausible argument that the issue has any more general significance.

There is also no reason for this Court to entertain the alleged issue relating to whether the district court's remand order foreclosed any subsequent decision that jurisdiction was exclusively in the federal courts. As demonstrated by a recent decision of this Court, the district court's remand order "had no relevance to [the state court's] inquiry into whether the pre-emption doctrine barred the state courts from exercising their jurisdiction." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 315 n.5, 331-332 (1981). An order remanding a case to the state court from which it was removed does not imply that the case was properly filed there, but only that it was removed "improvidently and without jurisdiction." 28 U.S.C. § 1447(c). No issue as to the existence of *state* jurisdiction is necessary to such a determination, and no finding as to state jurisdiction was made by the federal judge in this case.

In sum, the petition has not demonstrated any error by the court below or any significant conflict among lower courts over the questions the petition purports to present. For these reasons, and for the reasons more fully set forth below, the petition for a writ of certiorari should be denied.

II. THE COURTS THAT HAVE FOUND FEDERAL JURISDICTION OVER PMPA CLAIMS TO BE EXCLUSIVE HAVE CORRECTLY APPLIED THE *GULF OFFSHORE* DOCTRINE.

In *Gulf Offshore Co. v. Mobil Oil Corp.*, 458 U.S. 473 (1981), this Court was asked to determine whether federal courts have exclusive jurisdiction over personal injury and indemnity cases arising under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1313 *et seq.* Although the Court concluded that there is no exclusive federal jurisdiction under OCSLA,[13] the Court noted the following general principles of law:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction . . . . *Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly.* Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, *by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests* . . . .

Id. at 478 (citations omitted; emphasis added); *see also Hathorn v. Lovorn*, 457 U.S. 255, 267-68, *reh'g denied*, 458 U.S. 1131 (1982) (suggesting that actions under Sections 5 and 12(f) of the Voting Rights Act may be subject to exclusive federal jurisdiction).[14] In determin-

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[13] In ruling that state courts have concurrent jurisdiction over OCSLA actions, the Court noted, *inter alia*, that the only legislative history material urged as supporting exclusive jurisdiction were the criticisms of two Senators who *opposed* the OCSLA bill. 453 U.S. at 482-83. Further, state laws had been expressly incorporated within the OCSLA statute (*id.* at 480-81), so that state court judges would have as much or more expertise in applying their own state law. *Id.* at 484.

[14] The fact that exclusive jurisdiction may be implicit, rather than explicit, shows that petitioners may not rely solely on the statutory language that PMPA actions "may be brought" in fed-

ing whether federal jurisdiction may be implied from legislative intent or federal policy, the Court also listed three factors to be employed in the analysis:

> [T]he factors generally recommending exclusive federal-court jurisdiction over an area of federal law include *the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims* . . . .

Gulf Offshore at 483-84 (footnotes omitted; emphasis added).

As set forth below, the principles recognized in *Gulf Offshore* strongly support the ruling by the court below that the claim under the PMPA is within the exclusive jurisdiction of the federal courts.

A. Congress' Express Desire for Uniformity of Interpretation Strongly Supports Federal Jurisdiction Over PMPA Cases.

The first of three *Gulf Offshore* factors is "the desirability of uniform interpretation . . . ." [15] In the case of the PMPA, Congress has provided the courts with an explicit, unmistakable declaration of federal policy, as follows:

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eral court. 15 U.S.C. § 2805(a). The antitrust laws are a good example of statute which comes under the exclusive jurisdiction of the federal courts, *General Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 287 (1922), even though the relevant enforcement provision states only that persons suffering injury "*may*" sue in federal court. 15 U.S.C. § 15. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), did not hold that the statutory term "may" is a "clear pronouncement of legislative intent" as petitioners contend. (Pet. at 20.) Rather, this Court recognized that other factors must still be considered where state jurisdiction "is not excluded by express provision . . . ." 368 U.S. at 508.

[15] *See also* Note, *Exclusive Jurisdiction of Federal Court in Private Civil Actions*, 70 Harv. L. Rev. 509, 511-13 (1957), *cited with approval in Gulf Offshore*, 453 U.S. at 483-84 nn.12 & 13, and *Hathorn*, 457 U.S. at 266 n.18.

> In recent years, the friction between franchisors and franchisees in marketing of motor fuels has become so great that it has threatened adverse impacts upon the Nation's motor fuel distribution and marketing system. Numerous States have initiated various legislative actions to address these petroleum product franchising problems. These actions have, unfortunately, resulted in an *uneven patchwork of rules* governing franchise relationships which differ from State to State.
>
> *Needed is a single, uniform set of rules governing the grounds for termination and nonrenewal of motor fuel marketing franchises* . . . . Such a set of rules would clearly define the rights and obligations of the parties to the franchise relationship in the crucial area of termination of a franchise or nonrenewal of the franchise relationship.

S. Rep. No. 731, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 873, 877 ("Senate Report") (emphasis added). In adopting the PMPA, Congress chose to preempt all inconsistent state law so that the PMPA would provide "certainty and uniformity in . . . a nationwide motor fuel distribution and marketing network." *Id.* at 874; *see* 15 U.S.C. § 2806(a).[16]

These clear statements in the legislative history—as well as the text of the PMPA itself—demonstrate that Congress sought to provide both sides of the relationship with the benefit of a "single, uniform set of rules" that would replace the "uneven patchwork" of state regulation. This express federal policy of uniformity is better served if jurisdiction over PMPA is maintained exclusively within the federal system, as compared to spread-

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[16] The fact that States are only empowered to adopt laws which are "the same" as the PMPA, *id.*, is not an argument against exclusive jurisdiction, as petitioners contend. (Pet. at 20.) For example, the fact that States have enacted a variety of antitrust laws does not nullify exclusive federal jurisdiction over the Sherman and Clayton Acts. (See n.14, *supra*.) The PMPA's provision that any State's law must be "the same" only reinforces the principle of uniformity.

ing jurisdiction among myriad additional courts throughout the 50 States.[17] The Congressional declaration of the need for uniformity in the application of the PMPA demonstrates the need for exclusive federal jurisdiction over PMPA claims.

B. The Expertise of Federal Judges Over Federal Claims Also Supports Exclusive Jurisdiction, Particularly Because The PMPA Expressly Mandates The Application of Federal Procedural Rules.

The second *Gulf Offshore* factor supporting exclusive jurisdiction is the "expertise of federal judges in federal law . . . ." In contrast to OCSLA, which relies on legal concepts drawn from each state's law, *Gulf Offshore*, 453 U.S. at 484, the PMPA is exclusively the creation of the federal government, and is intended to supplant all inconsistent state law. *See, e.g., In re Herbert*, 806 F.2d 889, 892 (9th Cir. 1986). While numerous States had previously adopted laws designed to address problems in the petroleum franchisor-franchisee relationship, none of those statutes were equivalent to the PMPA in its attempt to provide clear and definitive guidelines. Senate Report at 877. The PMPA is a uniquely *federal* statute and one under which their prior experience and expertise benefits the lower federal courts.[18]

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[17] Where a statutory right may depend on judicial development for its content, "the danger of legal chaos will vary directly with the number of courts independently interpreting the right." M. Redish & J. Muench, *Adjudication Of Federal Causes Of Action In State Court*, 75 Mich. L. Rev. 311, 332 (1976). This is an important consideration in light of the importance Congress expressly attached to uniformity in the PMPA. As noted by the commentators quoted above, "the likelihood of varying interpretations of federal law . . . is substantially reduced when only federal courts are making the interpretations." *Id.* at 332 n.88.

[18] In its study of the division of responsibility between state and federal courts, the American Law Institute concluded that state judges are less exposed to the intricacies of federal substantive law, and that federal judges have developed "an expertness in deal-

Indeed, the principal author of the PMPA, Congressman Dinglell, spoke directly to the intended role of the federal courts in cases under the PMPA:

> The *key to this legislation* is the balance which is struck by including flexibility in the grounds which justify termination of nonrenewal and simultaneously requiring the franchisor prove to an impartial arbiter, *a Federal court judge*, that permissible grounds for termination or nonrenewal do in fact exist. Franchisee rights under this bill are, as a result, more meaningful than limitations on franchisor conduct, provided in some State laws, which are arguably more stringent. . . .

123 Cong. Rec. 10383 (April 5, 1977) (emphasis added). The quoted statement is a clear declaration of the benefits the PMPA's sponsors believed would flow from having *federal courts* decide issues under the PMPA, in contrast to the existing system in which state court judges applied state laws which were "arguably more stringent." [19]

In considering the "federal court expertise" prong of the *Gulf Offshore* analysis, the fact that the PMPA expressly mandates the application of *federal* procedural

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ing with questions of federal law that comes from more extended contact with such questions . . . ." American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Court* 166-67 (1969).

[19] The legislative history of the PMPA is thus materially different from OCSLA's legislative history. *Gulf Offshore*, 453 U.S. at 482-483. As the Ninth Circuit stated in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 436 (9th Cir. 1984), *op'n amended on denial of reh'g*, 815 F.2d 570 (9th Cir. 1987), "the absence of reference to the state courts combined with Congress's affirmative references to the federal courts suggests an intent to make federal jurisdiction exclusive." Although the legislative history sometimes refers, generically, to "the courts," petitioners are unable to cite even a single instance in which the legislative history expressly or implicitly contemplates *state court* jurisdiction. (Pet. at 22.) Petitioners' assertion that these statutory directives are "merely . . . guidelines" (Pet. at 24) is contradicted by the mandatory language of those statutory provisions.

rules is also a material factor that supports exclusive jurisdiction.[20] *See Hathorn*, 457 U.S. at 267 (reference in the Voting Rights Act to the three-judge court procedure under 28 U.S.C. § 2284); *see also Valenzuela*, 789 F.2d at 436 (Title VII requires application of Fed. R. Civ. P. 65). Even if Congress has the power to mandate state court application of the Federal Rules of Civil Procedure,[21] federal judges plainly have greater expertise in applying those Rules than do state court judges. Under *Gulf Offshore*, this important factor strongly supports the finding of exclusive federal court jurisdiction.

C. The Federal Courts Are More Hospitable to the Delicate Balance of Competing Interests Which Congress Attempted to Strike In the PMPA.

The third factor to be considered under the *Gulf Offshore* analysis is whether federal courts would be more "hospitable" than state courts to peculiarly federal claims. *Gulf Offshore*, 453 U.S. at 484. As noted above, the PMPA is a uniquely federal statute; no other state law is similar to the PMPA in terms of its detailed delineation of permissible versus impermissible grounds for termination or nonrenewal. Moreover, while many state statutes were "arguably more stringent," the PMPA was intended to strike a "delicate balance" between meaningful protections to franchisees and needed flexibility to franchisors. *Brach v. Amoco Oil Co.*, 677 F.2d 1218, 1220 (7th Cir. 1982); Senate Report at 877.

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[20] Section 2805(d) of the PMPA (15 U.S.C. § 2805(d)) provides that, if a franchisee prevails in an action under the PMPA, he may be entitled to actual damages "consistent with the Federal Rules of Civil Procedure . . . ." Section 2805(b)(2) of the PMPA imposes detailed standards to be applied to motions for a preliminary injunction which "embraced a judicial standard utilized by the Second Circuit." Senate Report at 899.

[21] In *Valenzuela*, the Ninth Circuit expressly questioned whether Congress has the power to mandate state court application of federal procedural rules. *Valenzuela*, 739 F.2d at 436.

Where, as here, federal law is being used to supplant an existing body of state law, it is likely that federal court judges will enforce the law in a way that is more faithful to federal policy than to the displaced state policy.[22] Since the PMPA contains elements that were not explicitly embodied in any existing state statutes, the need for interpretations that will be fully sympathetic to the entire mix of federal concerns is especially evident under the PMPA.

Contrariwise, the potential for *in*hospitable treatment by state courts is vividly illustrated in the case at bench. Here, the state court judge expressed the opinion that the PMPA is "lousy legislation." The state court judge also invidiously remarked that the PMPA is "a classic example of the kind of legislation that we get out of the Congress . . . ." Those statements explicitly suggested that the PMPA's detailed provisions were only the result of "self-perpetuation" by elected federal representatives and industry lobbysists. The state court judge's bottom line is that the PMPA is "a poorly drafted federal statute that is very hard to understand."

While the hostility to federal legislation reflected by such remarks is not necessarily characteristic of state court judges as a class, such attitudes are much less likely to be prevalent within the *federal* system.[23] The role

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[22] As one commentator has noted, "A third factor militating for exclusive federal jurisdiction is the probability that the federal courts will be more sympathetic to a new federal statute than will the state courts, *especially when the matter involved is controversial and the national policy is likely to be accepted with reluctance by certain groups.*" Note, *Exclusive Jurisdiction of the Federal Courts In Private Civil Actions*, 70 Harv. L. Rev. 509, 512 (1957) (footnote omitted; emphasis added).

[23] For example, the Ninth Circuit in rejecting a franchisee's claim under a parallel provision of the PMPA for a "first refusal" purchase option noted that "Congress here seems to have known precisely what it was doing." *Valentine v. Mobil Oil Corp.*, 789 F.2d at 1391.

Congress intended for the PMPA in a national policy relating to motor fuel distribution requires a faithful and evenhanded application, and strongly supports exclusive federal jurisdiction over PMPA claims.

For the reasons stated above, the petition for a writ of certiorari should be denied with respect to the first "Question Presented" set forth therein.

III. THE DISTRICT COURT'S REMAND ORDER DID NOT PRECLUDE THE COURT BELOW FROM DETERMINING THAT ITS EXERCISE OF SUBJECT MATTER JURISDICTION WOULD BE CONTRARY TO CONTROLLING FEDERAL LAW.

As the second "Question Presented," petitioners assert that the decision by the court below constituted a prohibited "review" of the district court's remand order, even though petitioners acknowledge that the court below did *not* reverse, vacate or modify that remand order. (Pet. at 25.) Petitioners' theory is that the decision below indirectly reviewed the remand order by substituting the opinion of the court below as to the proper jurisdictional forum. (*Id.*) However, petitioners' theory is contradicted by applicable Supreme Court authority and by the facts of this case.

In *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), this Court held that a decision to remand an action to state court, after removal, "had no relevance to [to the state court's] inquiry into whether the pre-emption doctrine barred the state courts from exercising their jurisdiction." *Id.* at 315 n.5. Although the state court in that case concluded that it could exercise jurisdiction over a shipper's claim against a railroad, the Court held that the shipper's action was subject to the exclusive jurisdiction of the Interstate Commerce Commission. *Id.* at 323, 331-332. Thus, the district court's remand order in that case did not constitute the last word on the subject of the proper

forum for the litigation, and the state court's judgment was instead reversed since the court had assumed a jurisdiction that was precluded by federal law. *Id.*

By contrast, none of the cases cited by petitioners involved issues of exclusive federal jurisdiction.[24] Neither this Court nor any other court has ever held that a district court may confer state court jurisdiction to hear where Congress has expressly or implicitly decided to limit jurisdiction to the federal courts. While 28 U.S.C. Section 1447(d) provides that "[a]n order remanding to state court . . . is not reviewable . . . ," a state court's inquiry into its own jurisdiction does not constitute such a prohibited review. Since the rule against appellate review of remand orders does not mean that they are free from error, *see, e.g., Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723, *reh'g denied*, 431 U.S. 975 (1977), intractable problems would be created if state courts were compelled to adhere consistently to a flawed analysis of the facts or law in the case, merely because a district court expressed erroneous views in its remand decision. The only reasonable interpretation of Section 1447(d) is simply that *the remand order itself* cannot be reversed, vacated or modified by any other court, but state courts have the same jurisdiction as they did before removal to consider their own jurisdiction, or to decide

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[24] The only two cases cited by petitioners as direct authority are *Missouri Pac. Ry. v. Fitzgerald*, 160 U.S. 556 (1896), and *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). (Pet. at 26-27.) Neither case involved an issue of exclusive federal jurisdiction. In *Fitzgerald*, this Court rejected a contention that the state courts lacked jurisdiction, but that contention was asserted *solely* on the ground that the federal court improperly remanded the claim on diversity grounds. Moreover, *Rath Packing rejected* a claim that the district court's remand order prevented the defendant from securing a federal forum by way of a declaratory relief action. 530 F.2d at 1303, 1305-06.

any factual and legal issues fairly presented by the case.[25] This Court recognized that principle in treating the remand order as "irrelevant" to the issue of state court jurisdiction in *Kalo Brick*, 450 U.S. at 315.

Petitioners also fail to present any reason to find that the second question presented is certworthy in any way, and the purported issue is lacking in sufficient significance to warrant review by this Court. The alleged issue is inextricably intertwined with the unique procedural history of this case, and is not one of general importance or one that is subject to any significant disagreement. Moreover, there is simply no reason for this Court to accept petitioners' invitation to broaden the scope of Section 1447(d) beyond anything contemplated by existing law, and the expanded rule sought by petitioners would create irreconcilable conflicts with existing law and federal policies relating to the exclusive or primary jurisdiction of federal courts and administrative agencies.

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[25] In this case, the district court's opinion did not even address the question of exclusive jurisdiction. Rather, the court felt that it could not acquire removal jurisdiction over a PMPA case which included a "non-franchisor" defendant. (Pet. App. 13-14, 22.) In that regard, the district court's decision is at odds with this Court's recent decision in *Carnegie-Mellon University v. Cohill*, —— U.S. ——, 108 S. Ct. 614 (1988), which held that pendent claims may be remanded "when *all* federal-law claims in the action have been *eliminated* . . . ." *Id.* at 616 (emphasis added). The dissenting opinion in *Carnegie-Mellon* expressed the view that a remand would not even be statutorily authorized under those circumstances. *Id.* at 623-24.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: November 18, 1988

APPENDIX

APPENDIX

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. 377024

Consolidated with Case Nos.:

399 330	406 857
406 851	406 858
406 852	407 545
406 853	409 749
406 854	410 941
406 855	410 942
406 856	

JACK ABADJIAN, *et al.*,
Plaintiffs,

v.

GULF OIL CORPORATION,
a Pennsylvania corporation, *et al.*,
Defendants.

And Related Counterclaims, Cross-Claims
and Consolidated Actions

[Filed Jan. 16, 1986]

JUDGMENT

The First Cause of Action of the Complaint herein for declaratory relief having been severed for separate trial to the Court without a jury; and the parties, in light of the Court's Memorandum Ruling of December 10, 1984, having stipulated to all facts material to that cause of action;

NOW, THEREFORE, it is adjudged and declared as follows:

1. The September 30, 1980 Agreement between defendant Gulf Oil Corporation ("Gulf") and defendant Thrifty Oil Company ("Thrifty") was an event and an action that gave to each plaintiff a right of first refusal to purchase Gulf's interest in the leased premises occupied by the respective plaintiffs.

2. The first refusal price which each dealer is entitled to receive from Gulf as of November 30, 1985, calculated in accordance with the formula stipulated to by the parties in their December 5, 1985 "Stipulation or Facts" is as follows:

Fee Properties	Service Station No.	First Refusal Price
Ball	1712	$ 82,475.00
Brown	724	$146,370.00
Eghenian	769	$198,488.00
Mazarei	1284	$304,711.00
Prouse	581	$101,599.00
Rosenstein	1099	$212,231.00
Shishmanian	392	$414,014.00
Smiderle	968	$ 45,922.00
Leaseholds		
Abadjian	1311	$ 3,629.00
Ceson	334	$ 32,107.00
May	321	$ 57,718.00
Webber	316	$–10,838.00

3. Each plaintiff must exercise his right of first refusal within forty-five (45) days of the date that the judgment herein becomes final. The right of first refusal must be exercised by depositing the first refusal price, calculated in accordance with the formula stipulated to by the parties in the December 11, 1985 "Stipulation of Facts," in an escrow to be established by Gulf with instructions that the first refusal price is to be transferred to Gulf upon delivery to the plaintiff of an appropriate deed or other conveyance transferring Gulf's interest in the leased premises of the respective plaintiffs to each plaintiff depositing the amount of the first refusal price.

4. The monthly rent which each plaintiff is obligated to pay Gulf and the unpaid rent which has accrued as of November 30, 1985, plus interest thereon at 7% per annum, are as follows:

Plaintiff	Monthly Rental	Accrued Rent As Of 11/30/85 With Interest At 7%
Abadjian	$1,083.00	$22,984.00
Ball	2,346.00	34,276.00
Brown	2,126.00	50,588.00
Ceson	2,757.00	43,327.00
Eghenian	2,636.00	21,033.00
May	1,561.81	53,150.00
Mazarei	2,674.00	75,272.00
Prouse	2,051.00	21,165.00
Rosenstein	1,221.00	16,519.00
Shishmanian	2,743.00	99,744.00
Smiderle	1,370.00	4,413.00
Webber	2,348.67 (plus gallonage rent of 1¢ per gallon over 65,000 gallons)	76,951.00

5. Each of the plaintiffs is occupying the service station property he leased from Gulf under the terms of an expired lease. Any plaintiff not exercising the right of

first refusal hereinabove provided for is obligated to vacate the leased premises immediately after the right of first refusal granted by Gulf has expired, and each plaintiff shall be obligated at the time the first refusal right expires without having been exercised to pay Gulf the amount of accrued rent and unpaid interest thereon at 7% per annum.

6. This Court shall retain on-going and continuing jurisdiction to determine the first refusal prices at which Gulf must make offers to the plaintiffs when the judgment herein becomes final. Such final first refusal prices shall be determined by the Court in accordance with the formula stipulated to by the parties in their December 11, 1985 "Stipulation of Facts."

7. This judgment resolves the conflicting claims of plaintiffs and Thrifty in properties owned by Gulf. For this reason, prejudice to the parties can be avoided only by speedy resolution of any appeal of this judgment. Accordingly, this Court respectfully requests that any appeal be handled by the Court of Appeal on an expedited basis.

Dated: Jan 15, 1986 /s/ Ronald E. Swearinger
RONALD E. SWEARINGER
Judge
Los Angeles County
Superior Court